

SEP 17 1976

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

No. **76-4001**

LEON JONES, et al., individually and as representatives of their class,

*Petitioners,*

—v.—

PACIFIC INTERMOUNTAIN EXPRESS, et al.,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

WILLIAM B. GOULD  
Stanford Law School  
Stanford, California 94305  
(415) 497-2979

JOHN DE J. PEMBERTON, JR.  
University of San Francisco  
Law School  
San Francisco, California 94117  
(415) 666-6297

MELVIN L. WULF  
American Civil Liberties Union  
Foundation  
22 East 40th Street  
New York, New York 10016  
(212) 725-1222

STUART P. HERMAN  
9601 Wilshire Boulevard  
Beverly Hills, California 90210  
(213) 273-5540

## INDEX

	<u>Page</u>
OPINIONS BELOW .....	2
JURISDICTION .....	2
QUESTIONS PRESENTED .....	2
STATUTORY PROVISIONS INVOLVED ...	4
STATEMENT OF THE FACTS .....	4
REASONS FOR GRANTING THE WRIT ...	11
CONCLUSION .....	20

### Table of Cases

<p>Acha v. Beame, 531 F.2d 648 (2d Cir. 1976) .....</p>	12, 16
<p>Albemarle Paper Co. v. Moody 422 U.S. 405 (1975) .....</p>	14, 17 18, 19
<p>Bing v. Roadway Express, 485 F.2d 441 (5th Cir. 1973) .....</p>	16
<p>EEOC v. Jersey Central Power and Light Co., 508 F.2d 687 (3d Cir. 1975), subsequently vacated, U.S. 44 U.S.L.W. 3663 (1976) ...</p>	8

(ii)

	<u>Page</u>
EEOC v. Local 638 . . . of the Sheetmetal Workers, 532 F.2d 821 (2d Cir. 1976) .....	12
Franks v. Bowman Transportation Co., 495 F.2d 398 (1974), reversed, U.S., 96 S. Ct. 1251 (1976) .....	7, 9, 11, 14, 18, 19
Griggs v. Duke Power Co., 401 U.S. 424 (1971) .....	17
Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) .....	15, 16, 17
Louisiana v. United States, 380 U.S. 145 (1965) .....	14
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) .....	8-9, 13, 14
Rich v. Martin Marietta, 522 F.2d 333 (10th Cir. 1975) .....	14
Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), review granted U.S. 44 U.S.L.W. 3662 (1976) .....	14, 16,

(iii)

	<u>Page</u>
United States v. Int'l Ass'n of Ironworkers, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971) .....	11
United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969) .....	12, 13, 15, 16
United States v. T.I.M.E.--D.C., Inc., 517 F.2d 299 (5th Cir. 1975), review granted, U.S. 44 U.S.L.W. 3661 (1976) .....	16
United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1972), cert. denied 412 U.S. 939 (1973) .....	12
Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), subse- quently denied certiorari, U.S. 44 U.S.L.W. 3663 (1976) .....	8

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. \_\_\_\_\_

---

LEON JONES, WILLIE DAVIS, DANNIE MILLAR,  
LONNIE E. WILLIS, SIM CALDWELL, JR.,  
WALTER HENDERSON, SAUL JAMES, CHARLES  
PHILLIPS, individually and as representa-  
tives of their class,

Petitioners,

-v.-

PACIFIC INTERMOUNTAIN EXPRESS, CONSOLI-  
DATED FREIGHTWAYS, GARRETT FREIGHT LINES,  
CALIFORNIA MOTOR EXPRESS, LTD., ALPHA  
BETA COMPANY (previously Alpha Beta  
Acme Markets, Inc.), CALIFORNIA TRUCKING  
ASSOCIATION, TRUCKING EMPLOYERS, INC.,  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
IBT LOCALS 287, 70, 468, 315, WESTERN  
CONFERENCE OF TEAMSTERS, JOINT COUNCIL  
OF TEAMSTERS NO. 7, NATIONAL OVER-THE-  
ROAD AND CITY CARTAGE POLICY AND NEGOTI-  
ATING COMMITTEE OF THE IBT, LOCAL 1546  
OF THE INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

-2-

Petitioners pray that a Writ of Cer-  
tiorari issue to review the judgment of  
the United States Court of Appeals for  
the Ninth Circuit entered in this action  
on April 30, 1976, as made final upon  
denial of petition for rehearing on  
June 21, 1976.

OPINIONS BELOW

The opinion for the Ninth Circuit is  
reported at \_\_\_ F.2d \_\_\_ and is set out  
in the Appendix, infra, pp. 4a-11a. The  
denial of petition for rehearing, \_\_\_  
F.2d \_\_\_, is set out in the Appendix,  
infra, pp. 12a-13a. The Order of the  
District Court for the Northern District  
of California is reported at \_\_\_ F.  
Supp. \_\_\_, and is set out in the Appen-  
dix, infra, pp. 1a-3a.

JURISDICTION

The judgment of the Court of Appeals  
for the Ninth Circuit was entered on  
April 30, 1976, and was made final by  
that Court's denial of petition for re-  
hearing entered on June 21, 1976. The  
jurisdiction of this Court is invoked  
pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners submitted uncontroverted  
evidence of the statistical absence of  
blacks among over-the-road drivers, re-  
placement of worksharing with a layoff  
policy when the first black was hired  
into an over-the-road position in 1968,  
and defendant Pacific Intermountain  
Express's (i) rejection of qualified  
black applicants on the ground that work



was not available while, in fact, white applicants were being hired, (ii) refusal to permit qualified black job seekers to submit applications, and (iii) deterrence of qualified applicants through a discriminatory reputation resulting directly from the above practices and policies.

In these circumstances,

1. Did the Court of Appeals err in holding only those petitioners who actually submitted applications for employment are eligible for seniority relief?
2. Did the Court of Appeals err in holding seniority relief may only run from the date an application for employment is submitted?
3. Did the Court of Appeals err in holding Title VII plaintiffs must prove intentional discrimination by defendants in order to be granted seniority relief?
4. Did the Court of Appeals err in affirming the district court's denial of petitioners' motion for preliminary injunctive relief, where the district court's judgment was based solely on an erroneous view of the law, and the Court of Appeals neither provided guidance to the district court on the proper exercise of its discretion nor carefully articulated why relief should not here be granted?

#### STATUTORY PROVISIONS INVOLVED

The right to contract, and the remedy, provisions of Sections 1 and 3 of the Civil Rights Act of 1866, which provisions are codified as 42 U.S.C. §§ 1981 and 1988 (1970).

The prohibition of discrimination by employers (in Section 703(a)), and the remedy provision (in Section 706(g)), of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a) and 2000e-5(g) (1972 Supp.).

These provisions are set out in the Appendix, infra, pp. 14a, et seq.

#### STATEMENT OF THE FACTS

Petitioners instituted this action in December 1973, seeking relief from employment discrimination on the part of Pacific Intermountain Express (P.I.E.), other trucking industry employers, the International Brotherhood of Teamsters (I.B.T.), Western Conference of Teamsters, and its local affiliates. Their claims were based upon: (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2000e-17 (1970), 1/ (2) Section 1 of the Civil Rights Act of

---

1/ In furtherance of the Title VII claim, petitioners had previously resorted to the California Fair Employment Practices Commission and the United States Equal Employment Opportunity Commission, as required by Section 706 of the 1964 Act, 42 U.S.C. § 2000e-5 (1970).

1866, 42 U.S.C. § 1981 (1970), and (3) Sections 1 and 301 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 and 185 (1970). The district court's jurisdiction rested upon 28 U.S.C. §§ 1331, 1343 and 2201, and 42 U.S.C. § 2000e-5.

Until 1968, when defendant P.I.E. first hired a black as an over-the-road driver, the road drivers were not laid off during a decline in business, but rather the drivers shared the available work. However, with the advent of black over-the-road drivers, this policy was abandoned. Affidavit of Thomas L. Murray. 2/

In November and December of 1974, defendant P.I.E. laid off all of its six black over-the-road drivers who had been employed at its Emeryville (California), Los Angeles, and Albuquerque terminals. All but one had been previously rejected and refused the opportunity to apply and all had been deterred from applying for employment with P.I.E. prior to the filing of the complaint in this lawsuit, though they were then qualified, available for work, and residing in the relevant labor markets. Affidavits of Leon Jones, Gene

---

2/ Affidavits and other evidence relied upon herein were submitted to the district court and transmitted to the Court of Appeals as evidence in this action. They will be provided to this Court pursuant to Rule 21, Rules of the U.S. Supreme Court.

Gathright, Robert Lattimore, Charles Phillips, Clellan Moore, and Richard H. Stinson, and Charge of Discrimination of George Turks. Most were hired after this action was commenced and all performed their work satisfactorily. They were laid off according to their date-of-hire seniority, in accordance with the last-hired-first-fired principle incorporated into the collective bargaining agreement between P.I.E. and defendant Teamsters Unions. See National Master Freight Agreement; Western States Area Motor Freight Agreement.

In January 1975, petitioners moved the district court for preliminary injunctive relief, praying for reinstatement of the laid off blacks and sharing of available work among incumbent all white work force and petitioners, and seniority equal to what would have been possessed by blacks but for P.I.E.'s discriminatory conduct. Petitioners presented uncontradicted evidence of P.I.E.'s discrimination, including statistical evidence of the complete absence of minorities from among the hundreds of over-the-road drivers employed by P.I.E. and affidavits of petitioners, to show that P.I.E.: (1) repeatedly rejected petitioners' applications while white applicants were being hired (Affidavits of Clellan Moore, Charles Phillips, Robert Lattimore, and Richard H. Stinson); (2) repeatedly refused to permit petitioners to submit formal applications (Charge of George Turks, Affidavits of Charles Phillips, Clellan Moore, Richard



H. Stinson) from as early as 1961 (Charge of George Turks) until as late as 1971, 1972 and 1973 (Affidavits of Charles Phillips and Clellan Moore); (3) maintained segregated working conditions under which whites were permitted to refuse to drive with blacks (Affidavits of Leon Jones and Gene Gathright); and (4) by such conduct and the absence of blacks among defendant's over-the-road drivers, discriminatorily deterred petitioners from applying for employment. Affidavits of Leon Jones, Gene Gathright, Robert Lattimore, Charles Phillips, Clellan Moore, Richard H. Stinson, and Charge of George Turks.

On April 1, 1975, the district court denied petitioners' motion for preliminary injunctive relief. Appendix, infra, p. 3a.

The district court relied upon Franks v. Bowman Transportation Company, 495 F.2d 398 (1974), subsequently reversed in this Court, \_\_\_ U.S. \_\_\_, 96 S. Ct. 1251 (1976), in which the Fifth Circuit held that under 42 U.S.C. § 2000e-2(h), there was no violation of Title VII where the seniority system continued effects of a discriminatory hiring practice so as to deny rejected applicants seniority credit that they would

have possessed but for unlawful discrimination. 3/

Thus, the district court concluded:

"Since PIE's seniority system and layoffs pursuant to it are valid, despite alleged past hiring discrimination, this Court must reject plaintiffs' proposal [of worksharing]." (Emphasis added.) Appendix, infra, p. 3a.

The district court provided no alternative ground for its granting petitioners no relief whatsoever. It did, however, comment that "even if the seniority system were valid," a remedy providing for seniority dated back to when petitioners would have applied for work but for P.I.E.'s discriminatory reputation must be rejected, as such a remedy

"would be inconsistent with the requirement that one seeking to prove racial discrimination against him in hiring show he actually applied for the desired position [McDonnell Douglas Corp. v. Green,

---

3/ The district court also cited Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), subsequently denied certiorari, \_\_\_ U.S. \_\_\_, 44 U.S.L.W. 3663 (1976), and EEOC v. Jersey Central Power and Light Co., 508 F.2d 687 (3d Cir. 1975), subsequently vacated, \_\_\_ U.S. \_\_\_, 44 U.S.L.W. 3663 (1976).

411 U.S. 792, 802 (1973)]." (Citation by the court.) Appendix, infra, p. 3a.

On appeal, petitioners painstakingly reviewed the nature and evidence of P.I.E.'s discrimination against them, discussed supra. Defendants, in their brief, relied on the law as it had been construed in the district court.

On April 30, 1976, the Court of Appeals affirmed the district court's denial of petitioners' motion for preliminary injunctive relief. Appendix, infra, p. 5a.

Though the district court had rendered its decision solely as a matter of law (see Opinion of the District Court, Appendix, infra, p. 1a, and discussion, supra), the Court of Appeals held its own review of that decision to be limited to only two areas of inquiry:

"(1) Will irreparable harm result absent a stay? (2) Is there a likelihood that the moving party will prevail on the merits?" Id., Appendix, p. 6a.

The Court of Appeals did note that, in light of this Court's decision in Franks, supra, continued reliance on the Fifth Circuit's opinion would be "error." However, the Court of Appeals construed Franks to hold that

"possible relief . . . (1) would date back only to the time the plaintiffs submitted

their applications for employment to employer defendants, (2) would be against only those employers who had then intentionally engaged in discriminatory, and hence unlawful, employment practices, and (3) would apply only to the benefit of presently qualified OTR drivers." Appendix, infra, pp. 7a, 8a.

Further, the Court of Appeals held that there is insufficient evidence in the record to show a "strong likelihood" of petitioners' succeeding on the merits, Appendix, infra, p. 8a, though petitioners' affidavits showing rejected applications, refusals to allow applications and deterrence from application were never rebutted by P.I.E., nor was this evidence ever addressed by the district court, which determined the issue upon an erroneous interpretation of the law.

On June 21, 1976, the Court of Appeals denied petitioners' request for rehearing en banc.



REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erred in Holding That Only Those Who Submit Applications for Employment Are Eligible for Relief Under Title VII.

This Court, in Franks v. Bowman Transportation Co., \_\_\_ U.S. \_\_\_, 96 S. Ct. 1251 (1976), held that "seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under Sec. 706(g) [of the Civil Rights Act of 1964]." Id. at \_\_\_, 96 S. Ct. at 1271.

The Court of Appeals, in holding that seniority relief is only available to those who have filed applications for employment, Appendix, infra, pp. 7a, 8a, misapplies this Court's mandate in Franks, so as to provide relief to "identifiable victims" only if these victims have actually submitted applications.

This holding conflicts with the positions taken by the Second, Fifth, Eighth and Tenth Circuits. 4/ In

---

4/ The court's holding appears as well to conflict with a prior holding in the Ninth Circuit, United States v. Int'l Ass'n of Ironworkers, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971), where seniority relief was made available by the district court to blacks who had not submitted applications, though the question was not directly addressed by the Court of Appeals in affirming the decision of the lower court.

Acha v. Beame, 531 F.2d 648 (1976), the Second Circuit held a Title VII plaintiff claiming discrimination in hiring might:

"satisfy her burden by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females." (Emphasis added.) Id. at 656.

See also, United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1972), cert. denied, 412 U.S. 939 (1973); EEOC v. Local 638 . . . of the Sheetmetal Workers, 532 F.2d 821, 832 (2d Cir. 1976).

And in United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (1969), the Eighth Circuit granted seniority in the Union hiring hall to black community residents likely to have been deterred from earlier belonging to the Union. "In the light of [community members' awareness of the Union's discriminatory policies], it is unreasonable to expect that any Negro tradesman working for a Negro contractor or a non-construction white employer would seek to use the [hiring hall or join the Union]." Id. at 132.

Notably in these cases the Second and Eighth Circuits provide eligibility for relief to a broad, unidentified

plaintiff class and, indeed, in Sheet-metal Workers, supra, the Eighth Circuit noted the lack of certainty to the plaintiff class to which it was providing relief, but determined such certain evidence was unnecessary. Id. at 132. Here, in sharp contrast, the Court of Appeals would deny eligibility to petitioners who are certain in number, and who have already set forth clear uncontroverted evidence, reviewed, supra, of their qualification and availability for employment, and of P.I.E.'s refusing to permit them to submit applications and deterring their application through years of specific proven acts of discriminatory abuse. 5/

The Court of Appeals' adoption of such a restrictive standard for eligibility mirrors the district court's reliance on McDonnell Douglas v. Green, 411 U.S. 792 (1973), Appendix, infra, p. 3a, for such a position. Though in McDonnell Douglas this Court did note that a prima facie case of discrimination may be made by showing, inter alia,

---

5/ See, for instance, the Charge of George Turks, who was refused permission to even apply in 1961. Thereafter he did not again apply at P.I.E. for many years. And see the Affidavit of Richard H. Stinson, who was refused an interview with P.I.E. in 1965. Thereafter he did not apply again until 1967. Here, where deterrees claim they knew P.I.E. did not hire blacks, they had substantial experience upon which to base their claim.

that application for employment had been made, id. at 802, it specifically noted that a case otherwise may be made in other factual circumstances. Id. at 802, n.13.

The Fifth and Tenth Circuits have considered and rejected the improper interpretation of McDonnell Douglas that the Court of Appeals appears here to adopt. See Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 55 (5th Cir. 1974), review granted U.S., 44 U.S.L.W. 3662 (1976); Rich v. Martin Marietta, 522 F.2d 333, 346-47 (10th Cir. 1975).

The approach of the Second, Fifth, Eighth and Tenth Circuits, supra, in contrast to that of the Court of Appeals here, adheres more faithfully to the mandate of this Court in Franks, supra, and to its duty "to render a decree which will so far as possible eliminate the discrimination in the future." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), quoting Louisiana v. United States, 380 U.S. 145, 154 (1965).



II. The Court of Appeals Erred in Holding Seniority Relief Under Title VII May Only Run from the Date of Submission of an Application for Employment.

The Court of Appeals' holding that "possible relief . . . (1) would date back only to the time the plaintiffs submitted their applications for employment to employer defendants," Appendix, *infra*, pp. 7a-8a, 6/ directly conflicts

6/ Notably, the Court of Appeals interposed a comment in its Opinion, Appendix, *infra*, p. 8a, indicating its concern with the actual availability of positions during the contested period. It is more than arguable that it is the court's intent to limit further the date from which seniority runs, *i.e.*, from vacancy rather than application.

On this point, the court's position is in conflict with that of the Fifth and Eighth Circuits. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (1969), *cert. denied*, 397 U.S. 919 (1970); United States v. Sheetmetal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969).

Moreover, petitioners in their affidavits, *supra*, have frequently noted the hiring of white employees while their applications were either not accepted or they were deterred from applying.

with the Second Circuit's holding in *Acha, supra*, that seniority remedially granted may run from the date upon which a claimant may show she was deterred from applying for employment.

The court's position also stands in conflict with that generally taken by the Fifth Circuit regarding the date used for calculating carryover seniority to remedy discrimination in the trucking industry. See United States v. T.I.M.E.--D.C., Inc., 517 F.2d 299, 318 (1975), *review granted* U.S., 44 U.S.L.W. 3661 (1976); Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 63-64 (1974), *review granted* U.S., 44 U.S.L.W. 3662 (1976); Bing v. Roadway Express, 485 F.2d 441, 451 (1973). In these cases that court has consistently held seniority should run from the date at which local drivers were qualified to drive over-the-road. 7/

Finally, the position of the Court of Appeals is inconsistent with the approach generally followed in the departmental seniority cases. See, *e.g.*, Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

7/ Petitioners here have submitted uncontroverted evidence of their experience and ability to drive over-the-road for many years prior to their eventual employment at P.I.E. And their satisfactory employment with the company and attempts to apply earlier stands as evidence of their interest in the jobs.



III. The Court of Appeals Erred in Holding P.I.E.'s Discriminatory Conduct Need Be Intentional in Order for Relief To Be Granted.

It is well settled that a plaintiff need not prove an intent to discriminate on the part of an employer in order to seek relief under Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). See, also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 995-97 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

Notwithstanding the unambiguous holdings of this Court in Griggs and Albemarle Paper Co., the Court of Appeals here holds petitioners may be granted:

"possible relief . . . against only those employers who had then intentionally engaged in discriminatory, and hence unlawful, employment practices . . . .

. . . .

[The court concluded] the matter should be remanded to the district court for trial. If the intentional discrimination against the plaintiffs is established . . . the court will [fashion appropriate relief]." (Emphasis added.) Appendix, infra, pp. 7a-9a.

The Court of Appeals is plainly in error and in conflict with this Court's holdings.

IV. The Court of Appeals Erred in Affirming the District Court's Denial of Petitioners' Motion for Preliminary Relief, Where the District Court's Judgment Was Based Solely on an Erroneous View of the Law, and the Court of Appeals Neither Provided Guidance to the District Court on the Proper Exercise of Its Discretion, Nor Carefully Articulated Why Relief Should Not Here Be Granted.

This Court, in Franks v. Bowman Transportation Co., \_\_\_ U.S. \_\_\_, 96 S. Ct. 1251 (1976), provided that a court's discretion denying relief under Title VII may not be exercised arbitrarily, but only upon sound legal principles, and in keeping with its duty to effect the objectives of Title VII. Id. at \_\_\_, 96 S. Ct. 1267. See also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 416, 421 (1974).

However, the district court in this action denied petitioners' motion for relief, not in the sound exercise of its discretion, but solely in reliance upon an erroneous view of the law. See Statement of the Facts, supra.

Notwithstanding the absence of discretionary action on the part of the district court, and the district court's clearly erroneous view of the law, the Court of Appeals somehow managed to conclude the district court did not abuse its discretion, and affirmed the denial of petitioners' motion for preliminary injunctive relief. The court

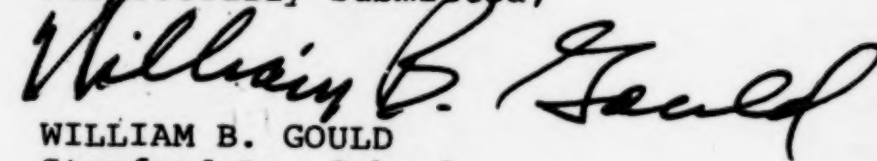
thereby breached its duty to provide firm guidance to the district court in the exercise of its discretion so as to provide for effectuation of the objectives of Title VII as is required under Franks v. Bowman Transportation Co. and Albemarle Paper Co. v. Moody, supra.

Nor did the Court of Appeals independently address the exhaustive evidence submitted by petitioners (see affidavits, discussed supra), so as to justify the affirmance of the district court judgment. In the face of petitioners' detailed review of this evidence, the Court of Appeals' conclusory comment--that "the necessary evidence is not in the record before us"--is scarcely an adequate explanation of its judgment. Where claimants have suffered continuous discrimination and personal abuse for many years (see affidavits, supra) and are suffering economic impoverishment as a result, and claimants petition the courts for relief, this Court's holdings demand that the court which denies such relief "carefully articulate its reasons for so doing" and provide careful guidance as well. Franks v. Bowman Transportation Co., supra, \_\_\_ U.S. at \_\_\_, 96 S. Ct. at 1269, citing Albemarle Paper Co. v. Moody, 422 U.S. at 421 n. 14. The Court Court of Appeals' scant consideration of petitioners' claim and refusal to provide the required guidance violate the letter and spirit of this Court's judgments in Franks and in Albemarle Paper, and is in error.

CONCLUSION

For the reasons stated, the Writ of Certiorari should be granted.

Respectfully submitted,



WILLIAM B. GOULD  
Stanford Law School  
Stanford, CA 94305  
(415) 497-2979

JOHN de J. PEMBERTON, JR.  
University of San  
Francisco Law School  
San Francisco, CA 94117  
(415) 666-6297

MELVIN L. WULF  
American Civil Liberties  
Union Foundation  
22 East 40th Street  
New York, New York 10016  
(212) 725-1222

STUART P. HERMAN  
9601 Wilshire Boulevard  
Beverly Hills, CA 90210  
(213) 273-5540

Attorneys for Petitioners

September 14, 1976

---

Attorneys for Petitioners gratefully acknowledge the assistance of Simon Klevansky, Stanford Law School, '77, in the preparation of this Petition.

# APPENDIX



- 1a -

ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF  
CALIFORNIA

---

LEON JONES, et al.,

PLAINTIFFS,

- v. -

PACIFIC INTERMOUNTAIN EXPRESS,  
et al.,

DEFENDANTS.

CIV. A. NO. C-73-2296 RHS

APRIL 1, 1976

---

ORDER

SCHNACKE, District Judge.

Plaintiffs allege employment discrimination and seek a preliminary injunction.

The collective bargaining agreement between defendant Pacific Intermountain Express (PIE) and defendant locals of the International Brotherhood of Teamsters, requires lay-offs in inverse order of seniority--the "last hired, first fired" system. Five black over-the-road truck drivers at PIE's Emeryville, Los Angeles, and Albuquerque terminals (Jones, Turks, Moore, Lattimore, Phillips) were laid off because of low seniority, and one, Gathright, is threatened with layoff. They argue that they have low seniority because, due to racial discrimination, they were not hired until relatively recently. Thus, plaintiffs argue, "last hired, first fired" is itself illegal under Title VII of the 1964 Civil Rights Act, justifying a preliminary injunction to get these drivers back to work. They rely upon Watkins v. United Steel Workers of America, Loc. No. 2369, 369 F.Supp. 1221, 1228 (E.D. La. 1974). But that case was decided before Franks v. Bowman Transportation Co., 495 F.2d 398, 417-418 (1974), was decided by the Court of Appeals for the Fifth Circuit, whose rulings are binding on the Watkins Court. In Franks constructive seniority back to the date of application was sought for black applicants for over-the-road truck driving jobs who applied before 1972, but were rejected because of race. But the Court held that this discrimination did not make illegal an otherwise bona fide seniority system. [42 U.S.C. §2000e-2(h)]. The Seventh Circuit [Waters v. Wisconsin Steel Works of Int. Harvester Co.,

502 F.2d 1309 (1974)] and the Third Circuit [Jersey Central Power & Light Co. v. IBEW Local 327, 508 F.2d 687 (1975)], have subsequently reached similar conclusions.

Since PIE's seniority system and layoffs pursuant to it are valid, despite alleged past hiring discrimination, this Court must reject plaintiffs' proposal (which appears contrary to Article 43, §2(a), of defendants' Western States Area Over-the-Road Motor Freight Supplemental Agreement), that those black drivers laid off be reinstated and the available PIE work be shared equally among all drivers. And even if the seniority system were invalid, this Court would reject plaintiffs' proposal that seniority of PIE's black drivers, laid off or otherwise, be dated back to when they would have applied for work at PIE, but for its alleged reputation for racial discrimination. This remedy would be inconsistent with the requirement that one seeking to prove racial discrimination against him in hiring show he actually applied for the desired position [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)].

The motion for a preliminary injunction is denied.

Dated: April 1, 1975

/s/Robert H. Schnacke  
Robert H. Schnacke  
United States District Judge

- 4a -

OPINION OF UNITED STATES  
COURT OF APPEALS FOR THE  
NINTH CIRCUIT

---

LEON JONES, et al.,

PLAINTIFFS-APPELLANTS,

- v. -

PACIFIC INTERMOUNTAIN EXPRESS,  
et al.,

DEFENDANTS-APPELLEES.

NO. 75-2049

FILED APRIL 30, 1976

---

- 5a -

BARNES and TRASK, Circuit Judges, and  
LUCAS,\* District Judge.

BARNES, Senior Circuit Judge:

This is an appeal from a denial of a motion for preliminary injunction. Our jurisdiction rests solely on 28 U.S.C. §1292(a)(1), which allows appeals from interlocutory orders denying injunctive relief.

We affirm.

As has been said by this Court on many occasions, and reiterated as recently as March, 1976:

"the district court's denial of a preliminary injunction is subject to a particularly narrow scope of review in this court. 'The grant or denial of a preliminary injunction is subject to reversal only if the lower court based its decision upon an erroneous legal premise or abused its discretion.' William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 562 F.2d 86, 88 (9th Cir. 1975), citing Douglas v. Beneficial Finance Co., 469 F.2d 453, 454 (9th Cir. 1972), and Burton v. Matanuska Valley Lines, 244 F.2d 647, 651 (9th Cir. 1957). Thus we are bound by the district court's resolution of conflicting evidence and other findings of fact. If the court applied the proper legal standard, we cannot reverse its decision unless denial of the

---

\*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.



injunction was so unjustified as to constitute an abuse of discretion."

Federal Trade Commission v. Simeon Management Corporation, \_\_\_ F.2d \_\_\_, No. 75-2363 (9th Cir. 1976). The granting or withholding of a preliminary injunction rests in the sound discretion of the trial court,<sup>1</sup> and among other factors to be considered are whether irreparable harm will result absent such stay, and whether there is a likelihood that the moving party will prevail on the merits.<sup>2</sup>

This appeal rests as to jurisdiction upon one of the five exceptions listed in 28 U.S.C. §1292, allowing an appeal without the usual requirement of finality in the trial court's action. These exceptions have been carved out by the Congress to "permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence."<sup>3</sup>

Thus but two areas of inquiry are open to a reviewing court in this type of appeal:

- (1) Will irreparable harm result absent a stay?
- (2) Is there a likelihood that the moving party will prevail on the merits?<sup>4</sup>

While the complaint in this employment discrimination action is not before us on this appeal in *haec verba*, appellants assert<sup>5</sup> in their motion (in conclusionary language only) that they have satisfactorily answered in the affirmative both questions asked above.

We note this action is one of the many cases presently before the courts on "The Problem of Last Hired, First Fired: Retroactive Seniority as a Remedy under Title VII."<sup>6</sup>

The trial court pointed out in its opinion that the collective bargaining agreement between defendant employer Pacific Intermountain Express and defendant locals of the International Brotherhood of Teamsters required layoffs of over-the-road truck drivers

("OTR drivers") in inverse order of their seniority, and that while plaintiffs rely upon Watkins v. United States Steel Workers of America, Loc. No. 2369, 369 F. Supp. 1221, 1228 (E.D. La. 1974) (a district court case in the Fifth Circuit), that same Circuit in Franks v. Bowman Transportation Co., Inc.,<sup>7</sup> a later appellate case, held that "constructive seniority back to the date of application, sought for black applicants for over-the-road truck driving jobs" who were "rejected because of race . . . did not make illegal an otherwise bona fide seniority system. 42 U.S.C. 2000e-2(h)." The district court also cited two Third Circuit cases which "subsequently reached similar conclusions."<sup>8</sup> Clearly the denial was justified under the law existing on April 2, 1975.

Franks v. Bowman Transportation Co., *supra*, was decided by the Supreme Court on March 24, 1976. \_\_\_ U.S. \_\_\_, 44 U.S.L.W. 4356. We note first that Bowman was a certified class action. The case before us is not.<sup>9</sup> Bowman dealt with the issues after a full trial. There has been no trial in this case. But Bowman held that both the district court's and the Court of Appeals' ruling that seniority relief was barred to certain plaintiffs (Class 3) by §703(h) of Title VII, 42 U.S.C. 2000e-2(h) was "clearly error." This statute was one basis relied upon by the district court as a ground for its denial of a motion for preliminary injunction. We cannot rely on it on this appeal, for in light of the Supreme Court opinion in Bowman, it would be error to do so.

It is also true that Bowman establishes there is a stronger likelihood that plaintiffs would prevail on the merits than has heretofore existed, though not as to all matters sought by plaintiffs below--but in a more limited way, and by way of relief under Title VII, §706(g). Such possible relief (unlike that demanded by plaintiffs below in their

motion), (1) would date back only to the time the plaintiffs submitted their applications for employment to employer defendants, (2) would be against only those employers who had then intentionally engaged in discriminatory, and hence unlawful, employment practices, and (3) would apply only to the benefit of presently qualified OTR drivers.

Appellants in their presentation below and on this appeal easily avoid any question of the then availability of jobs for either blacks or whites, when they assert the appellants here are entitled to have a seniority recognized, not back to the date when they first applied for their jobs, but back to the "fictional date"--the date they thought of applying, but failed to do so. There has been no consideration or determination here by the district court to establish that at any specific previous date any truck driving jobs were then available to anyone.

Brown, supra, does not hold that "an award of seniority status is a requisite in all circumstances." 43 U.S.L.W. 4363. The remedy under § 706(g) authorizes the court to "enjoin the unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . . or any other equitable relief as the court deems appropriate . . . 42 U.S.C. §2000e-5(g)." Franks v. Bowman, supra, 44 U.S.L.W. 4360 n. 19 (emphasis added). See also 4361 n. 21 and 4363, Part IV.

Thus, as we have stated, while there is now a slightly stronger likelihood that plaintiffs may prevail on the merits of the case, there is certainly no strong likelihood of such success, nor is it "extremely likely" as appellants assert,<sup>10</sup> primarily because the necessary evidence is not in the record before us--just as it was not before the district judge when he

denied the motion, which is the subject of this appeal.

We conclude the matter should be remanded to the district court for trial. If the intentional discrimination against the plaintiffs is established by competent, substantial evidence at such trial, the court will undoubtedly fashion what it deems to be proper, adequate and equitable relief. At this point, having examined the record before us, we cannot conclude the district court abused its discretion in denying plaintiff's application for a preliminary injunction. Accordingly, the denial of the motion for preliminary injunction is affirmed, and the matter is remanded to the district court for further proceedings.



FOOTNOTES:

<sup>1</sup>  
Meccano, Ltd. v. John Wanamaker, 253 U.S. 136, 141 (1920).

<sup>2</sup>  
County of Santa Barbara v. Hickel, 426 F.2d 164, 168 (9th Cir. 1970); King v. Saddleback Junior College District, 425 F.2d 426, 427 (9th Cir. 1970), cert. denied, 404 U.S. 979 (1971); Jones v. Board of Regents, 397 F.2d 259 (9th Cir. 1968); The Quechan Tribe of Indians v. Rowe, \_\_\_ F.2d \_\_\_, No. 72-3199 (9th Cir. 1976); Sellers v. Regents of the University of California, 432 F.2d 493, 497 (9th Cir. 1970), cert. denied, 401 U.S. 981 (1971).

<sup>3</sup>  
Wright on Federal Courts, Second Ed. (1973) p. 459.

<sup>4</sup>  
German v. Times Mirror Co., 520 F.2d 786 (9th Cir. 1975); Friends of the Earth v. Coleman, 518 F.2d 373, 377 (9th Cir. 1975); Robinswood Community Club v. Volpe, 506 F.2d 1366, 1368 (9th Cir. 1974); Associated Students v. NCAA, 493 F.2d 1252, 1257 (9th Cir. 1974).

<sup>5</sup>  
C.T. p. 4, ll. 7-9: "Plaintiffs allege that the law and facts in the instant case make it extremely likely that plaintiffs will prevail on the merits."  
C.T. p. 4, ll. 10-14: "If this preliminary injunction is granted, the injury, if any, to the defendants herein, if the final judgment is in their favor, will be minimal compared to the injury plaintiffs will continue to suffer if this preliminary injunction is denied."

<sup>6</sup>  
Title of an interesting note in 9 Georgia Law Review, 611 (1975). See also, "Last Hired, First Fired, Seniority, Layoffs & Title VII: Questions of Liability and Remedy," 11 Colum. J.L. & Soc. Prob. 343, 376, 378 (1975).

<sup>7</sup>  
495 F.2d 398, 417-418 (5th Cir. 1974) See also, United States v. Navajo Freight Lines, Inc., et al., 525 F.2d 1318 (9th Cir. 1975).

<sup>8</sup>  
Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 43 U.S.L.W. 2110, cert. filed, 44 U.S.L.W. 3037 (July 22, 1975); Jersey Central Power & Light v. I.B.E.W. Local 327, 508 F.2d 687 (3rd Cir. 1975), cert. filed, 44 U.S.L.W. 3084 (Aug. 1, 1975); 44 U.S.L.W. 3207 (Sept. 24, 1975).

<sup>9</sup>  
See C.T., pp. 87 and 88.

<sup>10</sup>  
See note 5, supra.



ORDER OF UNITED STATES  
COURT OF APPEALS FOR THE  
NINTH CIRCUIT

---

LEON JONES, et al., etc.

PLAINTIFFS-APPELLANTS,

- v. -

PACIFIC INTERMOUNTAIN EXPRESS,  
et al.,

DEFENDANTS-APPELLEES.

NO. 75-2049

FILED JUNE 21, 1976

---

BARNES and TRASK, Circuit Judges, and  
LUCAS, District Judge.\*

The panel as constituted in the above case has voted to deny the petition for rehearing, and to reject the suggestion for a rehearing en banc.

The full Court has been advised of the suggestion for an en banc hearing, and no judge of the Court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

\*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

CIVIL RIGHTS ACT OF 1866

42 U.S.C. Section 1981:

Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1988:

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the

trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Title VII, Civil Rights Act of 1964

Sec. 703(a); 42 U.S.C. Sec. 2000e-2a:

Unlawful employment practices--  
Employer practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Sec. 706(g); 42 U.S.C. Sec. 2000e-5(g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.